NO. 48836-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TACOMA SCHOOL DISTRICT, NO. 10.,
d/b/a TACOMA PUBLIC SCHOOLS,

Appellant and Cross-Respondent,

v.

III BRANCHES LAW, PLLC; TRUBY PETE;
SHEILA GAVIGAN; AND KATHY MCGATLIN,

Respondents and Cross Appellants.

III BRANCHES LAW, PLLC, TRUBY PETE, SHEILA GAVIGAN AND KATHY MCGATLIN RESPONDENTS'/CROSS APPELLANTS' REPLY BRIEF

JOAN K. MELL, WSBA #21319
Attorney for Truby Pete, Sheila Gavigan,
and Kathy McGatlin
III Branches Law, PLLC
1019 Regents Blvd. Ste., 204
Fircrest, WA 98466
ph: 253-566-2510
WAYNE FRICKE, WSBA #16550
Attorney for III Branches, PLLC
Hester Law Group Inc., P.S.
ph. 253-272-2157

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Anti-SLAPP immunity properly protects whistleblowers like the Lincoln Ladies and their attorney from retaliatory lawsuits like this one. The District was never concerned about the return of records. The District has always had the records, and the District made no effort to balance the confidential interests at stake via a protective order. The District wanted to silence the Lincoln Ladies. The Lincoln Ladies sought out counsel to assert their First Amendment rights. Their following whistleblower complaint was indeed the gravaman of this meritless lawsuit that is fraught with wholly unfounded accusations. There were no disclosures of confidential student records to the media. The only disclosures at issue involved the preparation and dissemination of the whistleblower complaint to the District, and after the lawsuit was filed the preparation and filing of the requested documents with the court. Both are communications with governmental entities that trigger anti-SLAPP immunity under RCW 4.24.510. The cross-appeal should be granted. The Lincoln Ladies and their attorney should receive an award of attorney's fees and costs at the trial level, and on appeal. They should each be awarded a statutory penalty of $10,000.00.

///

II. FACTS ON REPLY

The District's Reply misinforms the Court that the cross-appeal is based upon RCW 4.24.525, the SLAPP procedure that the Supreme Court declared void.[1] The Lincoln Ladies and their attorney cross appealed the trial court's order on their motion for summary judgment brought under the anti-SLAPP protections of RCW 4.24.510, not RCW 4.24.525.[2] RCW 4.24.510 remains a valid anti-SLAPP immunity that applies here. The protections were not repealed judicially in the *Davis* case.[3] The cross-appeal is well grounded. The Lincoln Ladies and their attorney are entitled to the anti-SLAPP protections of attorney's fees, costs, and statutory penalties. This court should grant them anti-SLAPP protection on cross-appeal.

The District also cites to RCW 42.41, the state statute setting local whistleblower requirements, even though the cross-appeal does not cite to nor rely upon local whistleblower protections for anti-SLAPP immunity.[4]

---

[1] *Davis v. Cox*, 183 Wn. 2d 269, 351 P.3d 862 (2015).

[2] CP 648 (Appended to Notice of Cross Appeal) & CP 55 (Motion for Summary Judgment), CP 58 - 63.

[3] *Davis v. Cox*, 183 Wn. 2d 269, 351 P.3d 862 (2015)("The legislature may enact anti-SLAPP laws to prevent vexatious litigants from abusing the judicial process by filing frivolous lawsuits for improper purposes.")

[4] Cross Respondent's Brief at 9; Cross-Appellant's Brief on Cross-Appeal at 22 - 30.

The whistleblower statute is not at issue. Anti-SLAPP immunity is implicated because the gravaman of the District's complaint concerns the Lincoln Ladies' whistleblowing conduct, including the assistance they received from counsel to file a formal whistleblower complaint with the school District and to comply with the court's ordered disclosures.[5]

The District contends "no disclosure was made to any agency of government prior to the lawsuit being filed in support of any communication of a concern."[6] Yet, the whistleblower complaint is the one disclosure known to the District when the District filed its SLAPP suit a few weeks later.[7]

The District's complaint refers to its demand letters to the Lincoln Ladies wherein the District cites to and references the whistleblower complaint expressly: "On September 2, 2014, various media outlets contacted the District to advise that attorney Joan Mell had provided to

---

[5] CP 599: The District prays for a determination that sharing information with counsel is an unlawful disclosure for purposes of blowing the whistle and when responding to a court ordered disclosure of records. Both activities require the assistance of counsel. As argued in Response to the District's appeal, shared communications with counsel do not equate to a "disclosure" in the context of confidentiality.

[6] Cross Respondent's Brief at 10.

[7] See timeline at CP 536. The Lincoln Ladies and counsel communicated with the District repeatedly on September 3, 11, and October 1, by phone and via letter. The District is simply not disclosing the responsive communications in its briefing when attempting to justify its frivolous anti-SLAPP lawsuit.

them a complaint that was submitted to the district's Superintendent by you and two other Lincoln High School staff members." The District's claw back correspondence with the media similarly cites to and relies upon the whistleblower complaint.[8] The District's complaint and amended complaint implicates anti-SLAPP protection because it is based upon the whistleblower complaint. The District knew the pages publicized by the media were redacted pages from the whistleblower complaint.[9] The District knew the whistleblower complaint did not contain FERPA protected records.[10] Redacted records are not FERPA protected.[11] Ironically, the other documents at issue were the personnel evaluations that the District disclosed to the Lincoln Ladies unredacted.[12]

Even after filing suit and in further violation of anti-SLAPP immunity, the District amended its SLAPP complaint citing to counsel's response to the trial court's directive that the "universe" of documents be

---

[8] CP 544.

[9] CP 542 & 544.

[10] CP 662.

[11] *Id.*

[12] CP 627-628 filed and sealed on appeal on DVD.

filed.[13] Counsel's efforts to assist the Lincoln Ladies in filing confidential student records with the court is a communication to government on matters of concern to the court, which implicates anti-SLAPP immunity under RCW 4.24.510.

The District does not fairly state the records at issue in its brief at page 3 when it compares the whistleblower complaint to the records reviewed in camera by the trial court. The Lincoln Ladies have always argued that the District's fabricated 2014 poor performance reviews of Pete and McGatlin over one hundred pages in length included many unredacted student records.[14] The whistleblower complaint did not. The District counts the pages of the whistleblower complaint, "46", to the segregated pages submitted to the court for in camera review, "402", in a

---

[13] CP 652: "When asked by the District is the "universe" could be limited to the unredacted client-provided documents, ***the court declined to enter such an order*** but stated the documents provided to the court must include that information with a breakdown of what was provided"; In the District's amended complaint it cites to communications with government at CP 596: "To the contrary, Tacoma Public Schools learned through the testimony of Joan Mell to the Honorable Judge Thomas Larkin on November 14, 2014, that Defendants McGatlin, Pete, and Gavigan have committed additional violations of FERPA by improperly removing over 12,000 documents and original binders with student records from the district and disclosing and providing them to III Branches Law without the consent of the affected students or their parents." The 12,000 documents are the "universe" of documents produced to the court as directed, which the Lincoln Ladies could not have accomplished on their own without technical and legal assistance with an *Ishikawa* order. See also suspension letters at CP 606, 638.

[14] CP 650: "attorney Mell proposed that the Defendants could file with the trial court the redacted documents attached to their whistleblower complaint **and the personnel evaluations.**" Emphasis added.

disingenuous effort to discredit the Lincoln Ladies and their attorney. It not only omits reference to the performance reviews, but e-mails and other district policies and procedures of and concerning students provided to Joan Mell that the District insisted be included in the order for in camera review.[15] The District's criticism is not supported by the record.

Finally, the District's remaining factual statement cites to and relies predominately on the convoluted record under Larkin that Whitener unwound and resolved correctly on summary judgment and the related motions. Larkin's orders are moot and meaningless given Judge Whitener's subsequent rulings based upon her actual review of records in camera. She recognized the First Amendment implications of Larkin's order to segregate records shared with counsel, and dispensed with such invasion by declaring the confidential communications privileged. What records were communicated and in what form to counsel remains a confidential communication protected under the attorney-client privilege. The District has no reason to demand such disclosure. Anti-SLAPP immunity here is warranted to deter against First Amendment

---

[15] CP 656: "The court heard arguments on the Defendants' motion to filed whistleblower complaint attachments pursuant to CR 26(b)(6) and ordered the Defendants to provide under seal all documents, records, emails and other information of and concerning students of the Tacoma School District that was provided to Joan Mell…"

violations in the future that would chill whistleblower speech and redress needed to protect public schools.

III. LEGAL ARGUMENT

A school district may not sue its professionals or their attorney to ascertain what information they shared and in what form while in consultation over exercising their First Amendment rights to report governmental misconduct. There is no civil right to enforce FERPA.[16] The communications are privileged.[17] Whistleblowers and their attorney are immune from suit under Washington's SLAPP statute, RCW 4.24.510, that protects "individuals who make good-faith reports to appropriate governmental bodies." Retaliatory lawsuits in response to whistleblowing activities implicate anti-SLAPP immunity.[18] Retaliatory lawsuits can be identified from the corollary facts that support the complaint. Where the "gravaman" of the complaint involves communications with government, rather than purely private matters, anti-SLAPP immunity applies.[19]

---

[16] CP 662 and *Gonzaga v. John Doe*, 536 U.S. 273, 122 S.Ct. 2268 (2002).

[17] RCW 5.60.060; *Anderson v. DSHS*, Div. II, PC Sup. Ct No. 47660-6-II, 2016 WL 6707116; *Newman v. Highland School District No. 203*, __ Wn.2d __, 381 P. 3d 1188 (2016) .

[18] *Valdez-Zontek v. Eastmont School Dist.*, 154 Wn.App. 147, 225 P.3d 339 (2010); *Johnson v. Ryan*, 186 Wn. App. 562, 570, 346 P.3d 789 (2015).

[19] *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 316 P.3d 1119 (2014).

The District filed suit to discredit and silence the Lincoln Ladies who effectively filed their whistleblower complaint against the District. The District's First Amendment animus is apparent from its complaint with its cross references to the District's letters citing to the Lincoln Ladies' whistleblower complaint. In addition, the District's allegations that the Lincoln Ladies disseminated protected student educational records to the media was knowingly false, and therefore frivolous, evidencing the District's retaliatory intent. The only reason the District continues to pursue this case is to attempt to mitigate against the Lincoln Ladies' First Amendment retaliation damages case filed against it.[20] The District long ago received copies of the copies of documents at issue here, yet it insisted it was entitled to invade the Lincoln Ladies' private and privileged communications.

In its Answer, the Lincoln Ladies demanded the District join the parents of all the students that it knew by name from the unredacted versions of the e-mails the District possessed that were attached in redacted form to the whistleblower complaint. The Lincoln Ladies sought joinder so that those parents could consent to release of their students' records for the whistleblower investigation into the District's practices of

[20] *Pete v. Tacoma School District*, US Dist. Court Case No. 16-5403 RJB.

directing underperforming student to the re-engagement center.[21] The District never joined them because the lawsuit was never about notifying them. The District did not want parents well informed about the disparities. The District has never been threatened with losing federal funding, and its claim that it needed to tell parents about the "disclosures" to comply with FERPA is a ruse because the District never did notify parent or students despite its ability to do so. The District's lawsuit is a SLAPP suit.

The District responds that private attorneys are not members of the judiciary entitled to immunity, when RCW 4.24.510 does not require private attorney's to be members of the judiciary for the anti-SLAPP immunity to apply. Of course private attorney's are not judges, but they are officers of the court with special privileges protected under the First Amendment. Anti-SLAPP immunity applies to any communication to "any branch or agency of federal, state, or local government…" The protection extends to communications to private counsel acting as an officer of the court to assist clients wanting to exercise their First Amendment rights.

---

[21] CP 1008.

The District fails to address the fact that its amended complaint squarely triggers anti-SLAPP immunity wherein the complaint is based upon the communication of records to the court. The District amended its complaint because the Lincoln Ladies and their attorney were communicating information to the court that was of interest to the court. The anti-SLAPP immunity applies.

IV. CONCLUSION

The Lincoln Ladies and their attorney request an award of attorney's fees, costs, expenses, and the statutory penalty of $10,000.00 each under Washington's anti-SLAPP immunity at RCW 4.24.510 on their cross-appeal. The District's lawsuit is a SLAPP suit, precisely the kind this State intended to deter against when codifying the anti-SLAPP protections that remain in effect post *Davis*. The trial court erred when failing to grant immunity and award the corresponding mandatory attorney's fees, costs, and penalties in its order granting summary judgment dismissal of the District's meritless lawsuit.

Dated this 18th day of November, 2016

III Branches Law, PLLC

Joan K. Mell, WSBA # 21319

Hester Law Group

/s/ *Wayne Fricke*

Wayne Fricke, WSBA# 16550

CERTIFICATE OF SERVICE

I, Joseph A. Fonseca, certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On the 18th day of November, 2016, I caused to be filed and served true and correct copies of the above Respondent/Cross Appellant's Reply Brief, and this Certificate of Service; on all parties or their counsel of record, as follows:

Via E-service & Legal Messenger:

Patterson, Buchanan, Fobes & Leitch, Inc., PS
2112 Third Avenue, Suite 500
Seattle, WA 98121
Ph: 206-462-6700
Onik'a Gilliam, oig@pattersonbuchanan.com
Mike Patterson, map@pattersonbuchanan.com
Angela Marino, amm@pattersonbuchanan.com
Stephanie Murphy, smm@pattersonbuchanan.com
Wayne Fricke, wayne@hesterlawgroup.com

Original E-filed with:
Court of Appeals, Division II
coa2filings@courts.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 18th day of November, 2016 at Fircrest, WA.

Joseph A. Fonseca, Paralegal

III BRANCHES LAW

November 18, 2016 - 3:11 PM

Transmittal Letter

Document Uploaded: 4-488361-Respondents Cross-Appellants' Reply Brief.pdf

Case Name:

Court of Appeals Case Number: 48836-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondents Cross-Appellants' Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Joan K Mell - Email: joan@3brancheslaw.com

A copy of this document has been emailed to the following addresses:

oig@pattersonbuchanan.com
map@pattersonbuchanan.com
amm@pattersonbuchanan.com
smm@pattersonbuchanan.com
wayne@hesterlawgroup.com